

No. 43308-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN McCARTHY,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES	ii
I. ISSUES.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	7
A. THERE WAS A CAUSAL CONNECTION BETWEEN THE CRIMES MCCARTHY COMMITTED AND RESTITUTUION ORDERED	7
1. Standard Of Review.....	7
2. There Was A Causal Connection Between The Crimes McCarthy Was Convicted Of And The Restitution.....	8
3. The State Concedes That The Record Lacks Evidence Of An Express Agreement	13
IV. CONCLUSION.....	13

TABLE OF AUTHORITIES

Washington Cases

<i>In re Barr</i> , 102 Wn.2d 265, 684 P.2d 712 (1984)	3, 11
<i>State v. Enstone</i> , 137 Wn.2d 675, 974 P.2d 828 (1999)	7
<i>State v. Hiett</i> , 154 Wn.2d 560, 115 P.3d 274 (2005)	9
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976)	6
<i>State v. Osborne</i> , 140 Wn. App. 38, 163 P.3d 799 (2007)	8
<i>State v. Thomas</i> , 138 Wn. App. 78, 155 P.3d 998 (2007)	8, 9, 10
<i>State v. Tobin</i> , 161 Wn.2d 517, 166 P.3d 1167 (2007)	8
<i>State v. Wade</i> , 138 Wn.2d 460, 979 P.2d 850 (1999)	8
<i>State v. Williams</i> , 104 Wn. App. 516, 17 P.3d 648 (2001)	8, 12

Federal Cases

<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)	3, 6
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Washington Statutes

RCW 9.94A.753(5)	8, 12
RCW 9.94A.753(7)	12

I. ISSUES

- A. Did the trial court exceed its authority when it ordered McCarthy to pay restitution for the burial expenses of two of the victims?

II. STATEMENT OF THE CASE

Sometime in the early morning hours of August 21, 2010, three individuals, David West Sr., David West Jr., and Tony Williams, were shot and killed at 101 Wings Way, Salkum, Washington. CP 6-7. A fourth person, Denise Salts, suffered a gunshot wound to her face at the same time. CP 7.

John Lindberg was also at the house at the time of the shootings. CP 7. Mr. Lindberg told officers that John Booth Jr. and another man arrived at the property about the same time he did. CP 8. Mr. West Sr. spoke to Mr. Booth outside while McCarthy sat at the kitchen table. CP 8-10. Mr. West Sr. and Mr. Booth came back inside, and Mr. West Sr. walked down the hall to his bedroom. CP 8. Mr. West Sr. then procured a shotgun and told Mr. Booth and McCarthy to leave. CP 8. Mr. Lindberg heard gunshots, but was hiding in a bathroom and could not see who was shooting. CP 9. Once the firing stopped Mr. Lindberg fled. CP 9. On his way out of the residence, Mr. Lindberg saw the dead and injured people lying on the floor. CP 9.

Ms. Salts, the survivor, was able to identify the two men involved in the shooting as Mr. Booth and McCarthy. CP 10. Ms. Salts stated Mr. Booth was the man who pulled the trigger and McCarthy was sitting at the kitchen table when she was shot. CP 10. Ms. Salts said when she was shot she immediately fell to the floor, but was able to hear other gunshots and heard McCarthy say "I don't think he's dead. Let's get out of here." CP 10.

McCarthy was charged by information on September 3, 2010 with Counts I-III, Felony Murder in the First Degree, and Count IV, Extortion in the First Degree. CP 1-5. On June 6, 2011 the State filed an amended information. CP 52-58. McCarthy was charged by amended information with Count I, Felony Murder in the First Degree, Count II, Murder in the First Degree, Count III, Felony Murder in the First Degree and Count IV, Attempted Extortion in the First Degree. CP 52-57. All counts included a firearm enhancement. CP 52-57. The State also filed notice of its intent to seek an exceptional sentence above the standard range because the multiple current offenses and McCarthy's high offender score would result in some of the current offenses going unpunished. CP 51.

Following negotiations with the State, McCarthy elected to plead guilty to the crimes charged in the second amended information. RP ¹ 57-75; CP 61-76. The second amended information charged McCarthy with Count I, Robbery in the First Degree, Count II, Residential Burglary and Count III, Attempted Extortion in the First Degree. CP 61-64. In his statement of defendant on plea of guilty (SDPG), McCarthy stated he understood that if the crime resulted in injury to any person or damage to or loss of property that the judge would order him to pay restitution. CP 67, McCarthy further acknowledged that the prosecuting attorney would recommend that McCarthy pay "RESTITUTION." 68. McCarthy entered an *Alford*² and *In re Barr*³ plea, denying he committed the crimes with which he was charged but choosing to accept what he believed was a favorable plea offer. RP 59-73; CP 73.

During the September 7, 2011, change of plea, the judge asked:

[Y]ou are not admitting to me the conduct that constitutes these crimes or the underlying crimes,

¹ The State will be citing to one of the three volumes of the verbatim report of proceedings. The State will refer to the VRP containing eight hearings (12-29-10; 4-19-11; 5-17-11; 7-14-11; 8-24-11; 9-7-11; 9-28-11; 3-23-12) as RP.

² *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

³ *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984).

with which you were originally charged, but you are telling me that the State's evidence is such that if that evidence were heard and believed by a judge or jury as a finder of fact, it's highly likely that judge or jury would find beyond a reasonable doubt that you are guilty of the more serious charges, so you are pleading guilty to take advantage of the plea offer. Is that what's happening here?

RP 63. McCarthy responded with, "Yes, Sir." RP 63.

The judge asked the deputy prosecuting attorney to present a synopsis of the evidence the State would present on the underlying charges. RP 63-64. The deputy prosecutor gave a summary of the evidence it would present including testimony from several witnesses who were not in the affidavit of probable cause. RP 65-69. The overview included that McCarthy and Mr. Booth showed up, uninvited, at the West residence to "tax" Mr. West Sr. RP 65-66. Taxing is essentially extorting money from people by either collecting a drug debt or collecting money one believes they are owed as a result of a crime or incident which occurred because of a drug obligation. RP 66. Mr. West Sr. asked Mr. Lindberg for money because Mr. Booth and McCarthy wanted money and Mr. West Sr. did not have any money. RP 66-67. Mr. West Sr. grabbed a single action shotgun and ordered Mr. Booth and McCarthy out of the house. RP 67. Mr. Booth shot and killed Mr. West Sr., David West Jr., and Tony Williams. RP 67. Ms. Salts was also shot by Mr.

Booth, but she survived and identified Mr. Booth and McCarthy as the people who were in the house. RP 67. Ms. Salts would also testify that she heard McCarthy say “I don’t think he’s dead, let’s get out of here” while she was on the floor bleeding. RP 68. The deputy prosecutor continued and stated, “Mr. McCarthy was there when it happened. He was with Mr. Booth. He’s been identified by the witnesses as quote ‘taxing’ individuals.” RP 69.

The judge asked McCarthy, “Do you agree what [the prosecutor] told me here on the record is a summary as it were of the evidence that the State would present, if this matter were to go to trial before a judge or jury?” RP 70. McCarthy stated, “I agree.” RP 70.

The judge then asked McCarthy,

Do you agree if a judge or jury heard that evidence and chose to believe that evidence, it’s highly likely that a judge or jury would find beyond a reasonable doubt that you are guilty as an accomplice of murder, at least by virtue of Felony Murder as charged in the original and also the First Amended Information?

RP 70. McCarthy stated, “I agree.” RP 70. The court notified McCarthy that the State’s recommendation included restitution that would be determined in a separate order. RP 72-73.

The judge stated:

Pursuant to the doctrine established by the United States Supreme Court case *North Carolina vs. Alford* and the Washington cases that have adopted and construed that doctrine, specifically, *State of Washington vs. Newton*, I find it highly likely that a judge or jury hearing the evidence summarized by [the prosecutor] and believing that evidence would find beyond a reasonable doubt that the Defendant Ryan Joseph McCarthy is guilty as an accomplice of at least three counts of Felony Murder in the First Degree, as well as Extortion as charged in the original Information.

RP 74.⁴

On September 28, 2011, McCarthy was sentenced. RP 77-103; CP 80-88. McCarthy's trial counsel suggested that Mr. McCarthy was not part of the killing and that sentencing McCarthy to 14 years in prison was a tragedy and would be a "black eye in the judicial system." RP 81. The judge sentenced McCarthy 171 months and reserved restitution for a later hearing. RP 98-99; CP 83-85.

At the restitution hearing held on March 23, 2012, the deputy prosecuting attorney made two arguments. RP 105-06. First, he argued that the crimes to which McCarthy pled were causally related to the victims' loss, specifically, but for the acts of attempted extortion and residential burglary, the victims would have lived. RP

⁴ *North Carolina v. Alford*, 400 U.S. 25; *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

105. Second, the deputy prosecuting attorney argued McCarthy expressly agreed to pay restitution. RP 106. The only restitution sought was for burial expenses for the murdered victims. RP 108. The judge ordered the restitution, stating that he was unsure whether restitution should or should not be ordered. RP 114-15.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THERE WAS A CAUSAL CONNECTION BETWEEN THE CRIMES MCCARTHY COMMITTED AND RESTITUTION ORDERED.

McCarthy and Mr. Booth went to the West residence to extort money from Mr. West Sr. But for McCarthy's and Mr. Booth's attempting to extort money from Mr. West Sr., Mr. Williams and Mr. West Jr. would not have been shot and killed. The funeral expenses for Mr. Williams and Mr. West Jr. are causally connected to the extortion attempt and the residential burglary to which McCarthy pleaded guilty. The restitution order should be affirmed.

1. Standard Of Review.

An award of restitution by the trial court is reviewed for an abuse of discretion. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial "court abuses its discretion when its

decision is manifestly unreasonable or based on untenable grounds.” *State v. Thomas*, 138 Wn. App. 78, 81, 155 P.3d 998 (2007), *citing State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) (internal quotation omitted). “If the judgment of a trial court can be sustained on any grounds, whether those stated by the trial court or not, it is the reviewing court’s duty to do so. *State v. Williams*, 104 Wn. App. 516, 524, 17 P.3d 648 (2001) (internal quotation and citations omitted).

2. There Was A Causal Connection Between The Crimes McCarthy Was Convicted Of And The Restitution.

The trial court’s authority to order a defendant to pay restitution is statutory. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007). “Restitution shall be ordered whenever the offender is convicted of an offense which results in ... damage to or loss of property ... unless extraordinary circumstances exist which make restitution inappropriate.” RCW 9.94A.753(5). Restitution is allowed for crimes that are causally connected to the crime charged. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Foreseeability is not required. *Tobin*, 161 Wn.2d at 524. Rather, the test is one of “but for” causation. *Id.* at 524.

In a juvenile case, the Supreme Court dealt with a situation where the damage to property occurred after the juvenile jumped out of a stolen vehicle. *State v. Hiett*, 154 Wn.2d 560, 115 P.3d 274 (2005). *Hiett* was a prosecution for taking a motor vehicle. A third party stole a car and he invited two juveniles to ride in it. When a police officer began following them, the two juveniles jumped out of the car. The third party attempted to elude the officer. The pursuit ended when he crashed into a Les Schwab store. The juvenile court required the passengers to pay restitution for damages to the store, even though they had left the car before the chase began. *Hiett*, 154 Wn.2d at 562-63.

The Supreme Court affirmed the award of restitution. “[B]ut for the taking of the automobile without permission, the crash and resulting damage to ... the Les Schwab property would not have occurred.” *Id.* at 566. Although *Hiett* involved the juvenile restitution statute, the Supreme Court has cited it in the context of adult restitution. *Tobin*, 161 Wn.2d at 524.

This Court has upheld a restitution order for injuries sustained in a vehicle collision caused by the defendant driving her vehicle while intoxicated. *State v. Thomas*, 138 Wn. App. 78, 155 P.3d 998 (2007). Thomas was charged with vehicular assault after

she drove a vehicle which was involved in a single car collision that seriously injured her passenger. The State charged the vehicular assault under two different prongs, disregard for the safety of others and driving under the influence of alcohol (DUI). The jury acquitted Thomas of vehicular assault but found her guilty of the lesser crime of DUI. The trial court later imposed restitution for the medical expenses incurred to treat the passenger's injuries. The trial court found that the DUI was one of the causes of the collision. *Thomas*, 138 Wn. App. at 81.

This Court upheld the restitution order in *Thomas*. *Id.* at 85. While the restitution was ordered under the misdemeanor restitution provision, like the felony statute it also requires that "[a] restitution award must be based strictly on the crime in question, the one for which the defendant was convicted, not other crimes." *Id.* at 82 (internal citations and quotations omitted). This Court held that the record contained sufficient evidence to support the trial court's findings that by a preponderance the passenger would not have been injured but for Thomas's DUI. *Id.* at 83.

In the present case McCarthy went to the West residence with Mr. Booth, uninvited, to extort money from Mr. West Sr. RP 65-67. McCarthy pleaded guilty to Attempted Extortion in the First

Degree. CP 61-76. After being ordered to leave the residence, by gun point, Mr. Booth and McCarthy stayed in the residence and Mr. Booth shot and killed Mr. West Sr., Mr. Williams and Mr. West Jr. RP 67-69; CP 8-10. McCarthy pleaded guilty to Residential Burglary. CP 61-76. McCarthy also entered an *In re Barr* plea to Robbery in the First Degree. CP 61-76. While McCarthy maintains that he did not know that Mr. Booth was going to shoot the people in the house and that he actually left the residence as ordered by Mr. West Sr., Ms. Salts's statements prove otherwise. RP 67-69, 81; CP 10. Ms. Salts said McCarthy was seated at the table when she came into the residence after hearing gunshots. CP 10. Ms. Salts was only able to say "Six", the name she knew Mr. Booth by, before Mr. Booth said, "How are you doing?" and shot her in the head. CP 10. Ms. Salts also heard other gunshots as she lay bleeding on the floor. CP 10. Ms. Salts heard McCarthy say, "I don't think he's dead. Let's get out of here." RP 68; CP 10.

But for McCarthy's actions in attempting to extort money from Mr. West Sr. and staying in the residence after being ordered to leave, presumably to continue the extortion or the assault that ensued, the victims in this case would not have been killed. Without McCarthy and Mr. Booth showing up uninvited to the West

residence to “tax” Mr. West Sr., there would not be any burial expenses to be paid because Tony Williams and David West Jr. would still be alive. There is a causal connection between the crime of Attempted Extortion in the First Degree and the murder of Mr. Williams and Mr. West Jr. The restitution in this case was ordered only for the burial and cremation expenses for Mr. West Jr. and Mr. Williams. Supp. CP Restitution Order, State’s Brief Restitution.⁵ The causal connection between the crimes McCarthy pleaded guilty to and the restitution ordered satisfy the requirements of RCW 9.94A.753(5) and (7).

The trial court read RCW 9.94A.753(7) to require restitution whenever crime victims compensation pays out an expense on a criminal case to a victim. Regardless of whether this Court agrees with that holding the causal connection exists and satisfies the elements of subsection five. RCW 9.94A.753(5). This Court can and should uphold the trial court’s restitution order under this rational. *Williams*, 104 Wn. App. at 524. The State respectfully requests this court to affirm the restitution order entered by the trial court.

⁵ The State will be filing a supplemental Clerk’s papers to include the Restitution Order and the State’s Brief regarding Restitution which has attached to it the documentation supporting the restitution.

3. The State Concedes That The Record Lacks Evidence Of An Express Agreement.

While the deputy prosecutor believed there to be an express agreement between the parties, the record in this case is lacking evidence of such an agreement. See RP and CP. Because the State is confined to the record, it must concede that there was not an express agreement between the State and McCarthy regarding restitution for burial expenses in this case.

IV. CONCLUSION

There was a causal connection between the crimes McCarthy pleaded guilty to and the burial expenses he was ordered to pay for in the restitution order. The State asks this Court to affirm the restitution order.

RESPECTFULLY submitted this 16th day of November, 2012.

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by: _____
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